

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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HAROLD E. BOSKET, JR.,

Plaintiff,  
v.

Civil Action No.  
3:13-CV-1234 (DEP)

CAROLYN W. COLVIN, Commissioner  
of Social Security,

Defendant.

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APPEARANCES:

FOR PLAINTIFF

LACHMAN & GORTON  
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OF COUNSEL:

PETER A. GORTON, ESQ.

FOR DEFENDANT

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Special Assistant U.S. Attorney

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

## ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security, pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was heard in connection with those motions on August 20, 2014, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18 (formerly, General Order No. 43) which was issued by the Hon. Ralph W. Smith, Jr., Chief United States Magistrate Judge, on January 28, 1998, and subsequently amended and reissued by Chief District Judge Frederick J. Scullin, Jr., on September 12, 2003. Under that General Order an action such as this is considered procedurally, once issue has been joined, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

ORDERED, as follows:

- 1) Defendant's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.
- 3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.



David E. Peebles  
David E. Peebles  
U.S. Magistrate Judge

Dated: August 21, 2014  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
HAROLD BOSKET, JR.,

Plaintiff,

vs.

3:13-CV-1234

CAROLYN COLVIN, Commissioner of  
Social Security,

Defendant.

-----x

Transcript of a Decision held by **teleconference**

on August 20, 2014, at the James Hanley Federal  
Building, 100 South Clinton Street, Syracuse,  
New York, the HONORABLE DAVID E. PEEBLES, United  
States Magistrate Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

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(The following is an excerpt from the telephone conference held on 8/20/14.)

(In Chambers, Counsel present via telephone.)

4 THE COURT: All right. I'll have to let that be  
5 the last word. So I appreciate excellent briefings and  
6 excellent oral argument in this case, it's a very interesting  
7 case and I found it to be very challenging, and I carefully  
8 reviewed the record in the context of the parties'  
9 submissions.

10 By way of background, the plaintiff in this case  
11 was born in December of 1971 and is currently 42 years of  
12 age, he was 40 at the time of the administrative hearing in  
13 this case. He suffers from a severe intellectual impairment  
14 and a physical impairment, specifically pars defect at L5 of  
15 the lumbar spine. He lives in Binghamton. He's married, he  
16 lives with three of the four children. They're extremely  
17 young. He has a ninth grade education, attended special  
18 education classes, has a checkered education history and was  
19 unable to secure his GED.

20 He last worked in 2010 for a trash company. Before  
21 that he held various jobs including between 2000 and 2008  
22 working for the Southern Tier Block, a construction  
23 operation. He was fired from his last job because he did not  
24 call in, or because he did call in, the record is somewhat  
25 equivocal at page 42.

1                   He has a history of alcohol and cocaine abuse in  
2 the past although it appears to be in remission. As counsel  
3 indicated, he did have a driver's license at one point but it  
4 appears that he lost that driver's license due to some  
5 driving while intoxicated charges.

6                   There is not a great deal of treatment history in  
7 the record. It consists primarily of consultative both  
8 examining and nonexamining source consultative reports.  
9 There is an MSW report from Carol Kuklis, November 17, 2010,  
10 examining reports from Dr. Sara Long who is a PhD, and  
11 Dr. Datta, both from May of 2011. There is a report by T.  
12 Harding, a state consultant from June 1, 2011, a physical RFC  
13 from a state agency consultant B. Talbert from June 2011, and  
14 a report of plaintiff's engaged orthopedic expert, Dr. Irwin  
15 Rosenberg, from July of 2012.

16                  Procedurally, the plaintiff applied for  
17 Supplemental Security Income and Disability Insurance  
18 benefits in March of 2011 alleging an onset date of July 31,  
19 2010. After those, after those applications were initially  
20 denied, the hearing officer, or administrative law judge, F.  
21 Patrick Flanagan, was appointed and conducted a hearing in  
22 August of 2012. Judge Flanagan rendered a decision in  
23 September of 2012, denying the claim and finding that the  
24 plaintiff was not disabled. That determination became a  
25 final determination of the agency when the Social Security

1       Administration appeals council denied review of that decision  
2       on August 28, 2013.

3                 In his decision, ALJ Flanagan found that the  
4       plaintiff was insured, at least through September 2013, he  
5       had not engaged in substantial gainful activity since his  
6       alleged onset date. He suffers at step 2 from two severe  
7       impairments, borderline intellectual functioning as well as a  
8       learning disability and pars defect at L5. He found,  
9       however, that none of the conditions either individually or  
10      collectively met or equaled any of the listed presumptively  
11      disabling disabilities in the regulations. He considered  
12      1.05 which relates to the spinal condition as well as 12.02  
13      and 12.05 relative to his mental impairments.

14                 The ALJ then determined after surveying the  
15      evidence that the plaintiff retains the residual functional  
16      capacity or RFC to lift and/or carry 20 pounds occasionally,  
17      10 pounds frequently, sit for six hours in an eight-hour day  
18      and stand and/or walk for six hours in an eight-hour day. He  
19      found further that he is able to stoop, twist, and bend  
20      frequently but not continuously; is able to push and pull  
21      20 pounds occasionally and 10 pounds frequently; is able to  
22      follow and understand simple directions and instructions; is  
23      able to perform simple tasks independently; can maintain  
24      attention and concentration; can maintain a regular schedule;  
25      can learn new tasks; can relate adequately with others; and

1 can manage stress adequately, which is essentially the  
2 ability to perform somewhat less than a full range of light  
3 work.

4 The -- at step 4, the ALJ concluded that plaintiff  
5 was unable to perform any of his past relevant work and  
6 applying Rule 202.17 of the grids, concluding that the  
7 impairments that plaintiff experiences do not significantly  
8 affect the job base upon which the grids are predicated,  
9 concluded no disability.

10 Addressing first the interesting issue of Section  
11 12.05(C) of the -- of the listings, clearly the plaintiff  
12 satisfies the IQ requirements here, also satisfies the  
13 additional prong of having a further physical or mental  
14 impairment that would qualify at step 2 of the analysis, that  
15 would be his pars defect. As the Second Circuit has  
16 recognized though 12.05(C) in *Talavera v. Astrue*, also  
17 requires consideration of whether the, whether the plaintiff  
18 suffers from cognitive defects, and adaptive defects that is  
19 at -- adaptive functioning defects. The ALJ went through a  
20 pretty, what I would consider good analysis. The -- clearly  
21 the plaintiff went through special education courses and  
22 under *Marmer* and other cases, that weighs in favor of perhaps  
23 finding a deficit in adaptive functioning, but as defendant  
24 argues, there are many other indicators that the plaintiff is  
25 able to function adequately. He cares for three young

1 children by his own account and by accounts given to others  
2 including Dr. Datta. He is able to cook twice a week, cleans  
3 twice a week, does laundry once a week, he takes care of the  
4 children, he showers, he dresses himself, he watches  
5 television, he's able to rebuild PS2 or Play Station 2  
6 computers. Dr. Harding indicated that plaintiff is not able  
7 to meet or -- any of the listings and that provides further  
8 support, evidentiary support for that conclusion. Dr. Long  
9 indicated that plaintiff has good social skills. Recounted  
10 also his daily activities and indicated that he is well  
11 oriented, that is at page 290 and 291 of her report. The  
12 record also indicates at page 254 from Social Worker Kuklis  
13 that the plaintiff is comfortable with his peers and in  
14 social settings. He has worked. In fact, he indicated at  
15 page 60 of the record that he believes he can work, that  
16 there are some jobs out there he can perform.

17 So, although I reviewed very carefully the Eastern  
18 District's decision in *Marmer*, it appears that that is  
19 significantly distinguishable. The impairments at *Marmer*, of  
20 *Marmer* were considerably more severe. In *Marmer*, the  
21 plaintiff suffered from -- have to give me a moment here --  
22 considerable defects that go beyond just the special  
23 education that is evident here.

24 So I find that the Commissioner's decision  
25 concerning the listing 12.05(C) is supported by substantial

1 evidence. The issue really is not whether I would have  
2 reached the same conclusion or a court in general would have,  
3 it is whether the decision reached is supported by  
4 substantial evidence, substantial evidence of course being  
5 defined as such relevant evidence as a reasonable mind might  
6 accept as adequate to support a conclusion, and in this case,  
7 the ALJ's decision is supported by substantial evidence on  
8 that issue.

9 Point two which we really didn't discuss was  
10 whether or not the ALJ properly considered plaintiff to  
11 suffer from a psychiatric impairment based on, primarily upon  
12 his educational records, and I find that the plaintiff has  
13 not carried his burden of demonstrating the existence of such  
14 an impairment that would meet the requirements at step 2. I  
15 don't find any error in that regard. Obviously pivotal to  
16 the ALJ's decision is the RFC finding. I conclude that that  
17 RFC is supported by substantial evidence, primarily in the  
18 form of Dr. Datta's report when it comes to the physical  
19 attributes and Dr. Long's report in that he properly chose  
20 and explained why he chose Dr. Datta's report over  
21 Dr. Rosenberg's. Both are nontreating sources. Granted  
22 Dr. Rosenberg has an area of expertise that perhaps Dr. Datta  
23 does not, but Dr. Datta's report is certainly supported by  
24 his findings after having examined the plaintiff.  
25 Dr. Rosenberg's report seems to contradict even plaintiff's

1 own testimony in several important regards.

2                   The -- turning to the argument that a  
3 vocational expert's opinion should have been sought, I find  
4 under SSR 85-15 and *Bapp v. Bowen* that the job base upon  
5 which the grids are predicated were not sufficiently eroded  
6 to require a vocational expert's testimony. There does not  
7 seem to be any *per se* rule in a borderline intellectual  
8 functioning case that would require expert testimony, and the  
9 *DeLeon* case from the Second Circuit that was relied upon by  
10 the plaintiff is materially distinguishable. It involved a  
11 plaintiff with cerebral palsy with a psychiatric disorder,  
12 epilepsy with organic brain syndrome as well as borderline  
13 intellectual functioning and physical problems and  
14 deformities, much more serious case than Mr. Bosket presents.

15                   So having reviewed carefully the record, I  
16 conclude that the Commissioner's decision is supported by  
17 substantial evidence and resulted from the application of  
18 proper legal principles.

19                   I thank you both for excellent arguments. I  
20 will grant judgment on the pleadings to the defendant and  
21 issue an order shortly memorializing this decision. Thank  
22 you both and have a great day.

23                   MR. ABRAHAM: Thank you, your Honor.

24                   (Proceedings adjourned, 10:40 a.m.)

25

CERTIFICATE OF OFFICIAL REPORTER

3 I, JODI L. HIBBARD, RPR, CRR, CSR, Federal Official  
4 Realtime Court Reporter, in and for the United States  
5 District Court for the Northern District of New York, DO  
6 HEREBY CERTIFY that pursuant to Section 753, Title 28, United  
7 States Code, that the foregoing is a true and correct  
8 transcript of the stenographically reported proceedings held  
9 in the above-entitled matter and that the transcript page  
10 format is in conformance with the regulations of the Judicial  
11 Conference of the United States.

Dated this 20th day of August, 2014.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR  
Official U.S. Court Reporter